Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	**MB Docket No. 17-105**

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	**MB Docket No. 16-41**
Independent Sources of Video Programming	)	

In the Matter of	)	
	)	
Authorizing Permissive Use of the "Next	)	
Generation" Broadcast Television Standard	)	**GN Docket No. 16-142**

REPLY COMMENTS OF TV ONE, LLC

I. INTRODUCTION AND SUMMARY

TV One, LLC ("TV One") submits these reply comments in response to the Commission's May 18, 2017 Public Notice,[1] in which it announced its Media Regulation Modernization Initiative and solicited comments from the public.

As an independently owned African American television network serving a population that has been chronically underserved by the television, entertainment and news industries, TV One has significant concerns about consequences that may flow from the Commission's proposal

[1] *Modernization of Media Regulation Initiative*, FCC, Public Notice, 32 FCC Rcd 4406 (rel. May 18, 2017) ("Public Notice").

to "modernize" its media rules unless adequate care is taken to safeguard the interests of independent and diverse cable networks such as TV One and the viewers they serve. While some media regulations no doubt are in need of update, or even repeal, the Commission must ensure that important safeguards, which are intended to protect independent programmers such as TV One, are not eliminated or eroded, particularly at a time when many of those provisions in fact are in need of strengthening. Any changes to the media regulations that the Commission considers – particularly any that bear on, directly or indirectly, (1) the program carriage rules, (2) consolidation among content conglomerates, broadcasters and multichannel video program distributors ("MVPDs"), or (3) practices, such as bundling, tying and retransmission consent, used by broadcasters and content conglomerates to occupy nearly all of MVPDs' linear platforms – must be assessed in light of the impact they may have on independent and diverse programmers and the diversity of viewpoints they provide to American television viewers.

II. ABOUT TV ONE

Launched in January 2004, TV One serves 59 million households, offering a broad range of real-life and entertainment-focused original programming, classic series, movies and music designed to entertain and inform a diverse audience of adult African American viewers. The network represents the best in African American culture and entertainment, with shows such as *Unsung, Rickey Smiley For Real, Fatal Attraction, The Manns* and *The NAACP Image Awards*. In addition, TV One is the cable home of blockbuster drama *Empire*, and *NewsOne Now*, the *only* live daily news program dedicated to African American viewers.[2]

[2] TV One was launched as a joint venture between Urban One, Inc. (formerly Radio One, Inc.) and Comcast Corp. Urban One subsequently bought out Comcast's share in stages, completing that process in April 2015.

Although TV One experienced substantial early stage growth, reaching more than 42 million homes by the end of 2007, recent expansion has come much more slowly, due to significant marketplace obstacles. This has been attributable, most significantly, to the fact that TV One is an independent network that lacks the leverage enjoyed by the relatively few powerhouse media companies that dominate the multichannel video distribution landscape. Those companies consist primarily of (1) conglomerate programmers who own as many as twenty or more cable networks ("content conglomerates"),[3] and who condition access to their marquee, "must-have" networks on MVPDs' bundled carriage of some or all of their other channels, including many that MVPDs would prefer not to carry;[4] and (2) broadcast television stations, who use their retransmission consent rights, and the threat of withholding must-have broadcast network programming, to pressure MVPDs to carry their tied multicast channels and affiliated cable networks, which MVPDs otherwise would not choose to distribute.[5]

Combined, the affiliated networks of broadcasters and conglomerate programmers occupy the overwhelming majority of capacity on MVPDs' linear platforms, leaving only a

[3] For example, Disney, Viacom and Time Warner each own 21 networks, Liberty Media owns 18 networks, News Corp. owns 15, CBS owns 14, and Discovery owns 13 networks (and assuming Discovery's purchase of Scripps Networks closes in 2018, it will own 22 networks).

[4] In one of the most notorious incidents of a conglomerate programmer's abuse of such leverage, Viacom was reported to have demanded ***one billion dollars ($1,000,000,000.00) more*** in license fees from Cablevision for just Viacom's most popular channels (Nickelodeon, MTV, BET and Comedy Central) than for a bundle that included these four "must-have" networks and 14 additional networks unwanted by Cablevision. *See*
Broadcast, Broadband and Bundle Bloat, S. Derek Turner, Free Press (May 31, 2013) *available at* http://www.freepress.net/blog/2013/05/31/broadcast-broadband-and-bundle-bloat.

[5] The power of retransmission consent to influence MVPDs' decisions regarding which cable networks to carry cannot be disputed. For example, it has been reported that, in the two years following its acquisition by Sinclair Broadcasting, Tennis Channel's distribution will have grown from 37 million to 60 million homes, or approximately 62 percent, with such growth attributed to Sinclair's use of its retransmission consent rights to pressure cable operators to expand their carriage of Tennis Channel. *See Sinclair secures more Tennis Channel Homes*, Daniel Kaplan, John Ourand, SBJ SBD (Aug. 29, 2016) http://www.sportsbusinessdaily.com/Journal/Issues/2016/08/29/Media/Tennis-Channel.aspx.

modest number of channels available for distribution of independent networks such as TV One. Faced with these marketplace conditions, TV One, like many other independent and diverse programmers, has found it increasingly challenging to grow, and in some instances to retain, distribution on MVPDs' linear platforms, and a number of independent programmers have had to cease operations.

Because of the direct interplay between these market conditions and FCC regulations, TV One has participated in prior FCC proceedings of strategic importance to independent cable networks, most recently in the Commission's rulemaking in GN Docket No. 16-142, concerning the proposed transition to the ATSC 3.0 broadcast standard. There, TV One explained that, as an independently owned African American television network serving a population that has been chronically underserved by the television, entertainment and news industries, it has grave concerns about the consequences that could flow from the ATSC 3.0 transition unless adequate safeguards are included to protect independent and diverse cable networks such as TV One.

In particular, TV One pointed out that the ATSC 3.0 transition would consume significant additional amounts of MVPDs' linear channel capacity due to (1) the spectrum-consuming nature of broadcasters' data-rich 3.0 signals, and (2) the certainty that, unless checks are built into the Commission's proposed ATSC 3.0 rules, broadcasters will use their retransmission clout to pressure MVPDs to carry both their 3.0 and 1.0 signals during what undoubtedly will be a lengthy transition period. In both respects, that increased occupation of MVPD bandwidth will compel MVPDs to cease carriage of some of the cable channels currently in their lineups, and to not add others that they otherwise might choose to distribute. When that choice has to be made, the channels that will get the ax are those without leverage – independent channels such as TV One, which lack the *in terrorem* effect of broadcasters' retransmission consent rights and cannot gain carriage through the forced bundling and tying practices employed by conglomerate programmers.

In the case of TV One, that would mean that African American viewers would be denied the services of one of the very few television networks devoted to serving the informational, cultural and entertainment needs and interests of the nation's African American population. As TV One explained, that would be too great a price to pay for any "potential" benefits to be derived from the ATSC 3.0 standard and would violate Congress' mandate to the FCC that it affirmatively act to promote the widest possible availability of diverse information sources and media voices to the public.[6] Similarly, loss of other independent networks, which like TV One are dedicated to serving viewing groups that habitually are unserved or underserved by the general television media, could not be justified by the improved audio, video or other potential benefits that migration to the ATSC 3.0 standard may someday bring about. TV One therefore urged the Commission to include in any ATSC 3.0 transition rules reasonable safeguards designed to protect independent and diverse programmers.

The Commission's current initiative, to "modernize" its media regulations, is both sensible and appropriate, and TV One does not object to that effort or to the elimination of truly outdated or unnecessary rules. However, lurking in some of the comments filed in response to the Public Notice are statements that reveal an intention to pave the way for more sweeping and

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[6] *See, e.g.*, 47 U.S.C. § 257(b) ("[T]he Commission shall seek to promote the policies and purposes of this chapter favoring ***diversity of media voices***, …." (emphasis added); 47 U.S.C. § 521 ("The purposes of this subchapter are ... to provide the widest possible ***diversity of information sources and services to the public***" (emphasis added); 47 U.S.C. § 532(a) ("The purpose of this section is to promote competition in the ***delivery of diverse sources of video programming*** and to assure that the widest possible ***diversity of information sources*** are made available to the public from cable systems in a manner consistent with growth and development of cable systems.") (emphasis added).

harmful changes that would increase the level of consolidation among media powerhouses[7] and further erode the opportunities for independent and diverse programmers to succeed in the multichannel marketplace. TV One is submitting these comments to call attention to these issues and urge the Commission to take care not to act in a manner that would tilt the playing field further against independent and diverse programmers.

III. THE FCC MUST NOT ALLOW "MEDIA REGULATION MODERNIZATION" TO BE USED TO UNDERCUT THE PROGRAM CARRIAGE RIGHTS, PROTECTIONS AND OPPORTUNITIES OF INDEPENDENT AND DIVERSE CABLE NETWORKS

In its comments, R Street Institute asserts that "the marketplace continues to shift away from facilities based MVPDs and toward over-the-top ("OTT") online video distributors ("OVDs")," [8] and that "the Internet now provides a nearly infinite supply of new video content." [9] Other commenters strike a similar chord, with the Content Companies[10] claiming that "[t]he programming marketplace is more competitive and diverse today than at any time in history," [11] and NCTA referring to "today's intensely competitive environment" and "vibrant competition

[7] Consolidation among the major media powerhouses continues, most recently with Discovery Communications' announcement that it will further bulk up with its $14.6 billion acquisition of Scripps Networks. https://www.wsj.com/articles/reality-bites-for-discovery-and-scripps-1501525814?tesla=y (*Reality Bites for Discovery and Scripps*). Other deals are sure to follow, as even the largest content conglomerates seek to achieve greater scale, contributing to the decline in diversity and an even more challenging environment for the increasingly few independent and diverse programmers left in the linear multichannel marketplace.

[8] R Street Comments at 2.

[9] R Street Comments at 3. R Street fails to note, although it well understands, that except for a very few go-to OTT internet video distributors, such as Netflix, few others can make it as a stand-alone programming destination. The absence of effective means of finding such sites on the Internet, viewing programming offerings and schedules through a central guide, selling advertising on a national basis, and other such hurdles, relegate most OTT products to the economic sidelines.

[10] CBS Corporation, The Walt Disney Company, 21st Century Fox, Inc. and Univision Communications Inc. (hereinafter the "Content Companies").

[11] Content Companies Comments at 2, 5.

among video programmers".[12] Touting "app-driven OVDs [as] the future of video"[13], and asserting that "[m]any of the legacy MVPD rules were premised on business models and competitive dynamics that no longer exist in the video marketplace,"[14] R Street asserts that the Commission's program carriage rules "should be amended or done away with ...", leaving negotiations between networks and broadcasters with their distributors to the "free-market".[15] NCTA posits a similar notion, asserting that "the sorts of unfair, anticompetitive conduct at which Section 616 was aimed" have diminished.[16]

The elephants in the room belie R Street's and the other commenters' arguments. First, while OTT distribution and similar offerings from OVDs may provide intriguing glimpses of the future, they do not represent the means by which the overwhelming majority of Americans view most of their desired video content. MVPDs' linear multichannel platforms remain by far the principal source through which American television viewers watch their favorite programs. While evolutionary trends may be in nascent stages of development, OTT today is additive only, and does not present an economically viable model for a full-time, non-premium, license fee and ad supported cable network that features original programming. Access to MVPDs' linear platforms is, and will remain for the foreseeable future, essential to the survival of cable television networks.

Second, even with the program carriage regulations now on the books, independent and diverse networks such as TV One find it more and more challenging to gain, and retain, carriage

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[12] NCTA Comments at 3, 15.

[13] R Street Comments at 4.

[14] R Street Comments at 4.

[15] R Street Comments at 2, 5.

[16] NCTA Comments at 15.

by MVPDs. Those regulations notwithstanding, the overwhelming share of MVPDs' spectrum that is allocated to carriage of cable networks is devoted to channels that are owned by either (1) content conglomerates, who use the power and appeal of their marquee channels to force MVPDs to carry numerous other unwanted channels, (2) broadcasters, who use their retransmission consent leverage to pressure MVPDs to carry the broadcasters' digital multicast channels or their affiliated cable networks, or (3) MVPDs themselves, who choose to carry their affiliated channels. The remaining sliver of linear platform spectrum is shared by scores of independent networks, resulting in many of them being passed over for linear distribution despite having significantly higher ratings and lower license fees than their conglomerate and broadcast rivals.

Third, it takes little imagination to foresee what havoc the "free marketplace" would wreak if current program carriage regulations were rolled-back, in whole or in part, and broadcasters, content conglomerates and MVPDs were free to cut bundled and tied distribution deals, unrestrained by any regulatory limitation. Independent networks would be unable to survive, notwithstanding the quality of the programming, and the better value, they present. While R Sreet pays lip service to the "vital[] importan[ce]" of "[v]iewpoint diversity",[17] its free-market, regulation-lite (or regulation-free) construct would make for carnage among independent cable networks and would be a tremendous setback to the source diversity that Congress has directed the Commission to protect and promote.

Yet, notwithstanding these elephants, R Street, the Content Companies, NCTA and others assert that the marketplace is "intensely competitive"[18], that "competition is more powerful and

[17] R Street Comments at 1.

[18] NCTA Comments at 3.

effective than regulation",[19] that many regulations are no longer necessary, and that those regulations are better left to the marketplace. That viewpoint – coming as it does from some of the most dominant and powerful media companies in the world, or their spokespersons – is not surprising. For they would have much to gain from the repeal, or dilution, of the program carriage regulations, just as independent networks such as TV One would have much to lose.

IV. CONCLUSION

Congress has recognized that our nation is served, and strengthened, by a media industry that reflects the voices and viewpoints of many diverse speakers, not just a few dominant powerhouses (no matter how many channels each of them may operate). To accomplish this important public policy goal, Congress has imposed on this Commission the duty to ensure that the public have available to it a diversity of media and information sources, a command that it has reiterated on numerous occasions.[20]

Just as TV One has no inherent opposition to the adoption of regulations for the transition to the ATSC 3.0 broadcast standard, it is not opposed to the general notion of modernizing the media regulations applicable to broadcasters, content conglomerates and MVPDs. However, as in the case of the proposed ATSC 3.0 transition rules, media regulation modernization must be undertaken by the Commission with great care to avoid any loss or dilution of existing regulatory protections for independent cable networks, the diverse viewpoints they present, and the diverse populations of viewers they serve.

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[19] NCTA Comments at 3.

[20] *See* note 6, *supra*.

Respectfully considered,

TV One, LLC